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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-874

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEONARD RAINWATER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

The Petitioner, William L. Cahalan, Prosecuting Attorney for the County of Wayne, State of Michigan, by Arthur N. Bishop, Assistant Prosecuting Attorney, respectfully prays that a writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, Division 1, entered on May 23, 1974, rehearing denied July 23, 1974, reversing a conviction (plea of guilty) entered on July 17, 1969, in the trial court.

OPINIONS BELOW

On December 7, 1970, in 28 Mich App 519, 18 NW2d 516 (1970), the original conviction herein was affirmed by the Michigan Court of Appeals. In a later appeal, the conviction was reversed by the same Court May 23, 1974 (Docket No. 15132), and rehearing denied July 23, 1974. The Supreme Court denied leave to appeal October 18, 1974 (Docket No. 56189). The full texts of the decisions are included in the Appendix,

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 USC §1257 (3), to reverse the decision of the Michigan Court of Appeals of May 23, 1974, and denial of rehearing July 23, 1974, plus denial of leave to appeal by the Supreme Court of Michigan October 18, 1974.

QUESTION PRESENTED

The United States Constitution does not require that, to establish a plea of guilty, there must be explicit judicial advice as to, and express waivers by, the defendant of the rights to trial, to confrontation and against self-incrimination, particularly where the right challenged has been exercised at preliminary examination.

CONSTITUTIONAL PROVISION

Directly involved is Amendment V to the United States Constitution, which reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

While on parole for a similar offense, respondent Rainwater was charged in a three-count Information with (a) breaking and entering an occupied dwelling with intent to rape, (b) carnal knowledge of a minor female, and (c) committing indecent liberties. The offenses occurred in Detroit, Michigan, February 18, 1969. At a preliminary examination April 9, 1969, in Detroit Recorder's Court, the complaining witness (prosecutrix) testified as to the rape and positively identified respondent Rainwater as the person who committed it. She was thoroughly cross-examined by defense counsel.

Plea negotiations resulted in permitting respondent Rainwater to plead guilty July 17, 1969 to the first count only (the breaking and entering). He denied coercion or inducement and rendered a judicial confession to the

charge. He acknowledged that he knew he had a right to trial; that, had he gone to trial, he would not have to testify; and that the prosecutor must prove him guilty beyond a reasonable doubt. He was aware that he faced a possible fifteen-year sentence, coupled with a probable parole violation. He again admitted the facts of the crime by a judicial confession to both the first and second counts.

On August 19, 1969, a sentence of fourteen to fifteen years was awarded, respondent having amassed three prior felony convictions.

The first appeal was decided on non-constitutional grounds, dealing only with the explanation of the elements of the crime and the sentence assessed.

The second appeal, though neither presented nor briefed for respondent, turned solely on the question presented here, reversal being predicated on the Constitutional duty to give specific judicial advice as to the subjective trial right to confrontation.

REASONS FOR GRANTING THE WRIT

The constitutional procedural mandates pronounced June 2, 1969 in *Boykin v Alabama,* 395 US 238, 243, 89 S Ct 1709, 1712, 23 L Ed 2d 274, 279 (1969), engendered many new landmark cases in criminal procedure and directly triggered multiple new Court Rules and policies among the several states. While *Boykin did* prescribe that the records of guilty pleas must indicate that defendants did so understandingly and voluntarily, it did *not* prescribe any litany for states to follow.

The State of Michigan has by Supreme Court decision, however, held that *Boykin* imposes an express litany on the states. Because of an omission from such litany, the present case was reversed. In *People v Jaworski,* 387 Mich 21, 25, 30, 194 NW2d 868, 869, 872 (1972), the Michigan Supreme Court held that the Court held that *Boykin* and the Federal Constitution prescribe that the plea transcript reveal express judicial advice as to, and express waivers thereof by the defendant, of the rights to trial, to confrontation and against self-incrimination, from June 2d, 1969.

Petitioners contend that such is not the law. The overwhelming weight of authority supports Petitioners' position. The instant case was reversed on the basis of the *Jaworski* interpretation of *Boykin* as being deficient in the express advice of the right to confrontation.

Only one other state has, interpreted *Boykin,* to require the rigidly ritualistic tenet, and that is California. *In re Tahl,* 1 Cal 3d 122, 460 P2d 449, 81 Cal Rptr 577 (1969), *cert den,* 398 U S 911, 90 S Ct 1708, 26 L Ed 2d 72 (1970). In California, the defendant must state on the record that he knows his *Boykin* rights, *People v Kilpatrick,* 7 Cal 3d 480, 498 P2d 992, 102 Cal Rptr 744, 746 (1972), for no implications will be allowed: *In re Sutherland,* 6 Cal 3d 666, 493 P2d 857, 100 Cal Rptr 129, 132 (1972).

Two other states require a rigid ritualistic approach, but they, too, differ from Michigan's *Jaworski,* in that they are not based on Federal Law. Oklahoma prescribed them in 1924 in *Polk v State,* 26 Okla Cr 283, 224 P 194, 206 (1924). Presently, absolute adherence is requisite to plea validity: *Arance v State,* 497 P2d 467, 469 (Okla Cr. 1972). Indiana trod the same path in 1927, *Nahas v State,* 199 Ind 117, 155 NE 259, 260 (1927), and now demands compliance as a "must." *Brimhall v State,* 279 NE 2d 557, 561 (Ind 1972).

All of the rest of the states which have been faced with the problem declare without exception that the record of a guilty plea depict understanding voluntariness rather than individualized recited/waived rights to trial, to confrontation, and against self-incrimination.

ARIZONA: *State v Laurino,* 108 Ariz 586, 480 P2d 342, 344 (1971); *State v Zaye,* 108 Ariz 13, 492 P2d 392 (1971).

FLORIDA: *Davis v State,* 277 So 2d 300, 306 (Fla App 1973).

ILLINOIS: *People v Arndt,* 49 Ill 2d 530, 276 NE2d 306, 307 (1971).

IOWA: *State v Abodeely,* 179 NW2d 347, 352 (Iowa 1970), cert den 402 US 936, 91 S Ct 1617, 29 L Ed 2d 104 (1971):

" . . . *Boykin v Alabama* undoubtedly requires that in all pleas of guilty in state courts the record must disclose defendant voluntarily and understandably entered his plea of guilty. Further, it must be shown defendant knew he was waiving the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers. But the United States Supreme Court in Boykin did not attempt to impose a rule of criminal procedure mandating the manner by which the record was to be developed. This was left to the state courts . . . "

MASSACHUSETTS: *Commonwealth v Marrow,* 296 NE2d 468, 473 (Mass 1973).

MISSOURI: *Turner v State,* 493 SW2d, 36, 38 (Mo App 1973).

NEBRASKA: *State v Turner,* 186 Nebr 424, 183 NW2d 763, 765 (1971).

NEVADA: *Hafflay v Warden, Nevada State Prison,* 89 Nev 556, 516 P2d 1403, 1404 (1973).

NEW MEXICO: *State v Cruz,* 82 NM 522, 484 P2d 364, 367 (NM App 1971).

WASHINGTON: *State v White,* 5 Wash App 615, 489 P2d 934, 935 (1971).

WISCONSIN: *Jones v State,* 59 Wis 2d 184, 207 NW2d 890, 898 (1973):

"... It is not the litany to be recited that is most important. It is rather that the record make clear that the plea of guilty was voluntarily and understandingly entered..."

Eight of the Federal Courts of Appeal have ruled on the question at bar, and among them there is total unanimity, that the Constitution does not require express advice and waivers.

The First Circuit confronted the problem earliest in time. In *United States v Webb,* 433 F2d 400, 403 (1st Cir 1970), the waivers were deemed self-evident by the record. Additionally, there was no allegation of failure to understand that the rights were being waived. Ritualism of a formal nature was not recommended.

The Third Circuit has twice ruled on the issue. The first one involved in a Pennsylvania bank robbery and was clearly

a deliberate choice to seize sentence concessions. That was *Davis v United States*, 470 F2d 1128, 1132 (3d Cir 1972), where the rationale was trenchantly phrased:

> " . . . This defendant had entered a plea of not guilty when arraigned more than six months before the opening of his trial. His subsequent request to change his plea was in open court where the paramount concern of the court was that the defendant was not under any compulsion to enter this plea. Appellant was asked whether the plea was voluntary and whether he realized he had a right to trial by jury. Once the court has satisfied itself in this manner that the guilty plea was made knowingly and voluntarily, an independent warning against self-incrimination becomes unnecessary . . . "

True, Davis was a pre-*Boykin* plea. But the Third Circuit solidified the policy by later applying it in equal vein to post-*Boykin* pleas. The end result of *United States v Vallejo*, 476 F2d 667, 671 (3d Cir 1973), cert den sub nom, 414 US 839, 94 S Ct 61, 38 L Ed 2d 65 (1973), reh den 414 US 1086, 94 S Ct 606, 38 L Ed 2d 491 (1973), was that constitutional compliance compels neither a litany nor a fixed formula..

The first of the Fourth Circuit triumvirate is so closely in point that it seems "tailor-made" for the case at bar. Dealing directly with the right of confrontation is *United States v Ready*, 460 F2d 1238, 1239 (4th Cir (1972):

> "To satisfy the requirements of Rule 11 and to meet Constitutional requirements it is not necessary for the court to spell out for the defendant every possible right provided by the Constitution for the protection of a person charged with crime. Here the defendant's intelligent waiver of trial by jury and his obviously

voluntary desire to plead guilty negates any possible inference that he was *unaware* that by pleading guilty he was waiving his right to be confronted with witnesses against him." (Emphasis added)

Next came *United States v Tabory*, 462 F2d 352, 353 (4th Cir 1972), a South Carolina marijuana smuggling case where the judge's inquiry substantially followed §1.05 of the Federal Judicial Center's Bench Book for United States District Judges (1969):

"... the judge told Tabory that if he pleaded guilty, he would waive his right to require the government to prove the charges, and he would subject himself by his plea of guilty to the maximum penalty provided by law. It is apparent, therefore, that although the judge did not expressly use the phrase, 'privilege against self-incrimination,' he adequately described this constitutional right and instructed Tabory that a plea of guilty would relinquish it."

Finally, there is the federal habeas corpus case emanating from West Virginia, *Wade v Coiner*, Warden, 468 F2d 1059, 1061 (4th Cir 1972), involving receiving stolen goods, wherein the policies of the Fourth and Fifth Circuits were intertwined:

" ... With the Fifth Circuit, we are aware of no precedent, from the Supreme Court or elsewhere, for the proposition that due process requires that a defendant be informed of each and every right which is waived by a guilty plea or that the waiver of these rights is a 'consequence', within the meaning of Rule 11, of which a defendant must be personally informed before a guilty plea may be accepted ..."

The Fifth Circuit's trio of authorities involve two Federal guilty pleas and a federal habeas corpus matter from Louisiana, spaced over a four-year period. *United States v Frontero*, 452 F2d 406, 415 (5th Cir 1971), reasoned it this way:

> "This Court is, however, aware of no precedent, from the Supreme Court or elsewhere, for the proposition that due process requires that a defendant be informed of each and every right which is waived by a guilty plea or that the waiver of these rights is a 'consequence', within the meaning of Rule 11, of which a defendant must be personally informed before a guilty plea may be accepted . . . "

Frontero then went on to point out the *ad infinitum* lengths to which simple plea procedure might have to go, for absolute adherence to all constitutional guaranties. *McChesney v Henderson*, Warden, 482 F2d 1101, 1106 (5th Cir 1973), cert den 414 US 1146, 92 S Ct 901, 39 L Ed 2d 102 (1974), applied a similar philosophy to state pleas:

> " . . . no rule of criminal procedure was mandated by *Boykin*, and there is no express requirement that specific articulation of the three constitutional rights above mentioned be given to the accused at the time of the acceptance of a plea of guilty, but it is necessary that the record show that the guilty plea was intelligently and voluntarily made. Supreme Court decisions after Boykin made this clear . . . "

More recently, the Fifth Circuit has declared that specific incantations do not constitute the constitutional test: *United States v Gearin*, 496 F2d 691, 696 (5th Cir 1974).

A knowing plea of guilty is, itself, the waiver of rights without their recitation, according to the Seventh Circuit:

United States v Berlin, 437 F2d 901, 906 (7th Cir 1971). The Eighth Circuit is in accord: *Todd v Lockhart,* Superintendent, 490 F2d 626, 628 fn[1] (8th Cir 1974), holds that expression articulation and waivers of the *Boykin* rights at the time of the entry of the plea are not prerequisites to validity.

The Ninth Circuit determined that the *Boykin* rights provide guidance in determining whether a plea is knowingly and intelligently entered, but no predetermined, ritualistic ceremony was ever mandated: *United States v Sherman,* 474 F2d 303, 305 (9th Cir 1973):

The Tenth Circuit similarly held in a duo of federal hebeas corpus cases, one from Oklahoma and one from Utah. The first involved a 1961 plea: *Freeman v Page,* Warden, 443 F2d 493, 496 (10th Cir 1971), cert den 404 US 1001, 92 S Ct 569, 30 L Ed 2d 554 (1971), reh den 406 US 963, 92 S Ct 2064, 32 L Ed 2d 351 (1971). The Utah case, however, like the case at bar, was a 1970 plea. That was *Stinson v Turner,* Warden, 473, F2d 913, 916 (10th Cir 1973), where, after opining that *Boykin's* real thrust was an affirmative record showing that the plea was voluntarily and intelligently entered, the Tenth Circuit went on to conclude:

> " . . . we do not believe that *Boykin* requires the enumeration of rights and the multiple waivers contended for by appellant. Instead we agree with the Fourth and Fifth Circuits that such detailed waivers on the record are not required by Boykin . . . "

At bar, there is no question of judicial advice concerning the rights to trial and against self-incrimination, for they are judicially related in plain, understandable terms.

Confrontation, however, was not spelled out. Instead, the court told respondent Rainwater that the prosecutor must prove him guilty beyond a reasonable doubt. What, then, *is* "confrontation," and, upon a plea of guilty, what suffices to show that the defendant knows that he surrenders that subjunctive trial right by his plea?

As a matter of law, the trial right of "confrontation" has been defined several different ways. One is supplied by *State v Farrell*, 223 NC 321, 26 SE2d 322, 325 (1943):

> " . . . the right of confrontation carries with it, not only the right to face one's accusers and witnesses with other testimony . . . but also the opportunity fairly to present one's defense . . . "

State v Martin, 53 NM 413, 209 P2d 525, 527 (1949), carries it a step further:

> " . . . the right to be confronted with the witnesses against him . . . means that he not only has the right to look upon such witnesses but to cross-examine them . . . "

Curtis v Rives, Superintendent, 75 US App DC 66, 123 F2d 936, 938 (DC Cir 1941), utilizes different words:

> " . . . . the substance of the guaranty of the Sixth Amendent is 'to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presnece, and give to the accused an opportunity of cross-examination' . . . "

"Confrontation" means that the witnesses for the prosecution shall be personally present when the accused is on

trial, *Westfall v Madison County*, 62 Iowa 427, 17 NW 614, 615 (1883); imports the opportunity to cross-examine them, *Wright v State*, 30 Ala App 196, 3 So 2d 195, 200 (1941); and is a substantive right, *State v Crooker*, 123 Maine 310, 122 A 865, 866, 33 ALR 821 (1923). Summing up as well as any is *People v Sorrell*, 39 Misc 2d 558, 241 NYS 2d 586, 588 (1963):

> "The right of confrontation means . . . the producing and physical presence of a witness for questioning. Exposing a witness for cross-examination is the essential right granted to the accused by the Sixth Amendment . . ."

Arriving directly at the matter at bar is *Ralph v State*, 124 Ga 116, 52 SE 298, 299, 2 LRA (NS) 509, 4 Ann Cas 501 (1905):

> ". . . Confrontation in criminal law has been defined to be the act of setting a witness face to face with the prisoner in order that the latter can make any objections he has to the witness, or that the witness may identify the accused . . ."

The object is the promotion of truth: *In re Terry*, 4 Cal 3d 911, 484 P2d 1375, 1384, 95 Cal Rptr 31, 40 (1971).

The theory in the constitutional provision is to prevent *ex parte* testimony: *Howser v Commonwealth*, 51 Pa (1 P.F. Smith) 332, (1865). More expansive verbiage is supplied by *Mattox v United States*, 156 US 237, 242, 15 S Ct 337, 39 L Ed 409, 411 (1895):

> "The primary object of the constitutional provision . . . was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal exami-

> nation and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Since guilt at trial can be proved only by witnesses, it is submitted that the *Boykin* requirement of waiver of the right to confrontation is satisfied when the defendant, on the record, has been advised that the prosecution must "prove guilt beyond a reasonable doubt," for confrontation is the meeting of the proofs: *State v Vasquez,* 101 Utah 444, 121 P 2d 903, 906, 140 ALR 755 (1942):

Such, clearly, happened here.

Futhermore, Petitioners submit that in the instant case, defendant had in fact been confronted with the proofs. Here, respondent had a thorough preliminary examination and exhaustively cross-examined the only certified prosecution witness who could supply personal knowledge testimony as to the fact of the crime. Had respondent elected to go to trial and had the witness (complainant) been unavailable, there would have been no legal barrier whatever to the admissibility at trial of the transcript of the complainant's testimony at the preliminary examination: *People v Hermes,* 73 Cal App 2d 947, 168 P2d 44, 48 (1946):

When the right of confrontation has been afforded at the preliminary examination, the constitutional guaranty has been fulfilled: *State v Burke,* 102 Utah 249, 129 P2d 560, 562 (1942); *People v Valdez,* 82 Cal App 2d 744, 187 P2d 74, 77 (1947). More eloquently in point is *State v Hefferman,* 24 SD 1, 123 NW 87, 88, 25 LRA (NS) 868, 140 Am St Rep 764 (1909):

> " . . . It has long been a settled rule of evidence . . . that the testimony of a witness given in a former action, or at a former stage of the same action, is competent in a subsequent proceeding of the same action, . . . where it is also shown that the former giving of such testimony was under oath, and that opposing party cross-examined or was afforded an opportunity to cross-examine such witness. This rule has been generally applied in criminal cases . . . it being held that, where the defendant has once at some proper stage of the proceeding been confronted with and met such witness face to face, has cross-examined him, or been given the privilege to do so, the provisions of these Constitutions have been satisfied . . . "

Petitioners submit that it is particularly inappropriate to rigidly insist on a litany recitation of confrontation, where as here, defendant has in fact been confronted with the principal proof against him. Confrontation at examination is different only in nature, not in principle from that at trial. *A fortiori* is this true as to a thoroughly experienced defendant in a criminal case. As was well said in *Turner v State*, 493 SW2d 36, 38 (Mo App 1973):

> " . . . One who has been to the well four times cannot now complain that he does not know how to draw water . . . "

See, also *Bennett v Commonwealth*, 463 SW2d 331, 332 (Ky 1971) and *Edwards v State*, 51 Wis 2d 231, 186 NW 2d 193 (1971).

The plea transcript is not, of course, the total "record" whereby knowledge of the cluster of constitutional rights ceded by a plea of guilty can be established for ala:egation leading to conviction. The test is not so much a rote recita-

tion by the judge as it is the subjective scienter of the defendant. Thus, the *Boykin* waivers can be shown by the records of postconviction hearings: *State ex rel LeBlanc v Henderson* Warden, 261 La 315, 259 So 2d 557, 562 (1972), (collecting authorities from various states, 259 So 2d 563, relating the extent of *Boykin* waivers required on the record); *State v Geppi*, 17 Md App 639, 303 A 2d 790, 792 (1973); *Vickery v State*, 258 SC 33, 186 SE2d 827 (1972). Certainly, then, confrontation of the only *real* eyewitness at preliminary examination is enough, and it has been so held: *State v Weil*, 12 Ariz App 471, 472 P2d 82, 84 (1970).

Accordingly, petitioners submit that *Boykin v Alabama*, 395 US 238, 243, 89 S Ct 1709, 1712, 23 L Ed 2d 274, 279 (1969) did not command the states to depict in plea transcripts literal judicial individualized recitations of the rights to trial, to confrontation, and against self-incrimination, together with accompanying express, particularized waivers thereof by defendants as conditions precedent to constitutional verity of convictions so based. Petitioners further submit that "confrontation" is a term needing no absolute phraseology and that exercising such right at preliminary examination suffices to carry it on through sentencing. Respondent Rainwater's plea of guilty was both truthful and understanding. At no time has he ever contended that he did not *know* about the right to confrontation. Significant, too, is the stark truth that an attack on the absence of judicial advice thereof was never formally raised on his behalf in two appeals spaced years apart.

Where the record shows that the judge has accepted the plea of guilty as being the defendant's voluntary act, he has "sterilized" the entire plea: *Sloan v Wainwright*, Director, 469 F2d 390, 391 fn 2 (5th Cir 1972). Nor has voluntariness been destroyed merely because the defendant faces "unpleasant alternatives" when he negotiates a plea of

guilty: *Monsour v Cady*, 342 F Supp 353, 357 (ED Wis 1972), aff'd, 478 F2d 1405 (7th Cir 1973), *cert den* 414 US 1010, 94 S Ct 375, 38 L Ed 2d 249 (1973).

This plea was constitutionally, legally, and factually firm. For Michigan in 1972 to apply retroactively a doctrine never pronounced was, it is submitted, incorrect. That is precisely what happened in *People* v *Jaworski*, 387 Mich 21, 25, 30, 194 NW 2d 868, 869, 872 (1972). Such was then compounded by being applied much later to the case at bar whose conviction was supposedly final in 1970. Rigid ritualism in pleas of guilty was not prescribed by the federal Constitution or by the United States Supreme Court. The Michigan Court of Appeals has, herein, said it was. This was erudite error.

CONCLUSION

Petitioners, the People of the State of Michigan, request the Honorable Supreme Court of the United States to grant their Petition for Writ of Certiorari and to vacate the decisions below; in the alternative, Petitioners request that the Writ be granted and that, upon hearing, the decisions below be reversed.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne, State of Michigan

PATRICIA J. BOYLE
Principal Attorney
Research, Training and Appeals

/s/ ARTHUR N. BISHOP
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
224-5791

ANB:mll

Dated: January 8, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
LEONARD RAINWATER,
Respondent.

APPENDIX

COMPLAINT

(State of Michigan—Recorder's Court—City of Detroit)

The People of the State of Michigan v Leonard Rainwater	P 6903963

Witnesses: Bernita Daniel, Dorothy Daniel, Terry Daniel, Dhan Parehl, Anthony Mazurek, Thomas Van Schoick, James Morrison, Steve Husek, Antoinette Gulowski, Mary George, Bohdar Komonytsky, Marion Moore A-94 WD.

(1) Breaking and entering occupied dwelling with intent to commit a felony rape.

(2) Carnal knowledge of female minor.

(3) Indecent liberties.

Date of offense—February 18, 1969

Location—2773—25th Street

Complainant—Bernita Daniel

Complaining witness—Bernita Daniel

State of Michigan
County of Wayne } ss.
City of Detroit

The complaint and Examination of the above-named Complaining Witness taken and made before the undersigned Judge (or Acting Judge) of the Recorder's Court, upon the date indicated below, who being duly sworn says that heretofore on the Date of Offense listed above, at the Location listed above in the City of Detroit, County of Wayne, State of Michigan, the above-named Defendant(s), late of the City of Detroit,

Count I

feloniously did then and there break and enter a certain occupied dwelling house belonging to the above-named Complainant, situated at the above-designated Location, with intent to commit the crime of rape therein; Contrary to Sec. 750.110 C. L. 1948, as amended by P. A. 1964 No. 133

Count II

did unlawfully and carnally know and abuse the above-named Complainant, who was then and there a female under the full age of 16 years, Contrary to Sec. 750.520 C. L. 1948, as amended by P. A. 1952 Act 73

Count III

being then and there a person over the age of sixteen (16) years, did then and there assault the above-named Complainant, a child being then and there under the age of sixteen (16) years and did take or attempt to take indecent and improper liberties with the person of the said Complainant without committing or intending to commit the crime of rape or the crime of sodomy or gross indecency upon the said child, Contrary to Sec. 750.336 C. L. 1948, as amended by P. A. 1952 No. 73 and P. A. 1954 No. 51 contrary to the form of the statute in such cases made and provided, etc.

Wherefore, the said Complainant prays that the said Defendant(s) may be apprehended and held to answer this Complaint and further dealt with in relation to the same, as law and justice may require.

/s/ Bernita Daniel
Complaining Witness
/s/ Hon. Wm. J. Sutherland
Judge (or Acting Judge) of the
Recorder's Court of the City
of Detroit

Dated: March 26, 1969

A 152337

WITNESS LIST

Detroit Police Department
Detroit, Mich., March 26, 1969

IN THE RECORDER'S COURT

(Carnal knowledge of female minor by force and against her will)

(Offense for which Defendant is held to Recorder's Court)

The People of the State of Michigan
v
Leonard Rainwater

E. Burke Montgomery, Esq.
Clerk of Recorder's Court

Dear Sir:—The names and residences of the witnesses for the people in the above entitled cause are as follows:

Names	*Residences*
Bernita Daniel, Complaining Witness	2773 25th
Dorothy Daniel	2773 25th
Terry Daniel	2773 25th
Dr. Dhan Parekl	Detroit General Hosp-Rec Branch
Patr. Anthony Mazurek	DPD #2
Patr. Thomas VanSchoick	DPD #2
Patr. James Morrison	DPD #2
Patr. Steve Husek	DPD #2
PW Antoinette Gulowski	DPD-WD

PW Mary George ..... DPD-WD

Bohdar Komonytsky ..... DPD-Scientific Lab.

PW Marian Moore ..... DPD-WD

Respectfully,

Marion Moore
Officer in charge of Case
Badge No. A94, Precint No. WD
Police Department Complaint Order
Number 644206

A 152337

EXAMINATION

(State of Michigan—Recorder's Court—City of Detroit)

The People
v
Leonard Rainwater } File No. A-152337

Examination held before the Honorable Joseph E. Maher, a Judge of the Recorder's Court, on Wednesday, April 9, 1969.

Appearances: Mr. William O. Cain, Assistant Prosecuting Attorney, appearing on behalf of the People; Mr. James Jackson, Jr., Attorney-at-Law, appearing on behalf of the Defendant.

* * * * *

(2) Court Clerk Jack La King: This is file A-152337, the People v. Leonard Rainwater.

Mr. Jackson: Ready for the defendant, your Honor.

The Court: All right, Mr. Prosecutor.

BERNITA DANIEL, after having been first duly sworn by the Court Clerk, was examined and testified under oath as follows:

Direct Examination

By Mr. Cain:

Q. Please state your name, witness.

A. Bernita Daniel.

Mr. Jackson: May it please the Court, as to this matter we are willing to stipulate that on or about the 18th February, 1968—or I am sorry,—1969, that the following charges, —or, that the elements of the following charges did in fact take place, that is, breaking and entering, in count number one; and count two, carnal knowledge of a female minor; and count three, indecent liberties, your Honor.

(3) The Court: All right, go ahead, Mr. Cain.

Q. What is your name please, witness?

A. Bernita Daniel.

Q. And where do you live?

A. 61 Blaine.

Q. On the 18th of February, 1969, at about 3:30 a.m. were you at 2773—25th Street?

A. Yes, sir, I was.

Q. And is that in the City of Detroit?

A. Yes, sir, it is.

Q. Now, at that time,—or, it is alleged that you were raped at that time, is that correct?

A. Yes.

Q. And is the person,—or, was this at knifepoint?

A. Yes, sir, it was.

Q. And is the person that allegedly did this to you, in court here today?

A. Yes.

Q. Can you point him out?

A. Yes, sir, he is right there by the table (indicating).

Q. Do you have any doubt in your mind that this is the same person?

A. It is the same one.

Q. It is the same person, definitely?

(4) A. Yes.

Q. Are there any identifying marks by which you are able to distinguish him from anyone else?

A. Well, it is him, because I know him, and I seen him close.

Q. And are his facial feature the same now as they were then?

A. Yes.

Q. Did he have any other hair styling other than what he has now?

A. His mustache looks like it was thicker, but it is the same one.

Q. Is there anything else about him?

A. No.

Q. But you are certain that this is the same person that did this to you, is that right?

A. Uh-huh (affirmative).

The Court: Either say yes or no. Is that the same person?

A. Yes, sir, it is the same, that man sitting there.

Q. And there is no doubt in your mind, but that this defendant, Leonard Rainwater, is one and the same person who did these acts as alleged in the Complaint and Warrant, to you, and at that time and place, is that right?

A. That is right, there is no doubt at all.

Mr. Cain: All right, cross examine.

(5) *Cross Examination*

By Mr. Jackson:

Q. Now, this was dark at night, was it?

A. Yes.

Q. And were there any lights on in the room where this happened?

A. No.

Q. And this was in the bedroom, is that right?

A. Yes.

Q. And were you able to discern the features of the man in the dark?

A. Yes, sir, I was, because there was two streetlights outside.

Q. So I take it that there are windows in this room where this happened, is that right?

A. Yes.

Q. Do you happen to know how far those streetlights were from the windows?

A. Not too far, but about two houses down.

Q. All right, and you are saying that from the light of the streetlights two houses away, that you could see the man's face, is that correct?

A. Yes, sir.

Q. Could you see the man's face clearly?

A. Yes, I could.

Q. And you say he had a knife?

A. Yes.

(6) Q. And you were afraid, were you?

A. Yes, sir, I was.

Q. All right. And when did you next see this man after that?

A. Going down 25th Street.

Q. Going down 25th Street?

A. Yes, sir.

Q. And how long was this after the occurrence on this night in question?

A. About a week.

Q. What time of the day or night was this that you saw him then?

A. It was in the evening, but I don't know what time it was.

Q. Was there anyone with you when you saw him on this second occasion or the second time?

A. I think another girl was with me.

Q. Another girl was with you then, is that right?

A. Yes.

Q. And what is that young lady's name?

A. Cherie.

Q. Cherie what?

A. Neal.

Q. And do you know where this Cherie Neal lives?

A. On 23rd Street.

Q. Did you make any comments or remarks to Cherie Neal when you saw him?

(7) A. Yes, sir.

Q. What did you say?

A. I told her that that was the man that broke into the house and raped me.

Q. All right, and what did you do then?

A. I went on over to her house.

Q. And then what did you do after you got to her house?

A. We told her mother, and we waited there, and we came back out then, and I told my brothers, and then we got in the car and we was riding down the street coming down 25th, and we seen him, and we stopped the car and we parked the car, and then when we parked the car and got out, he was gone.

Q. All right, and then when did you next see him, if you did?

A. I seen him with my mother, on the Boulevard,—or, I mean on Bangor.

Q. And you were with your mother then, is that right?

A. Yes.

Q. And on what day was this?

A. I don't know what day it was.

Q. Or can you remember how long ago it was,—or was it a week ago, or ten days ago?

A. It was about a month.

Q. All right, and you say you saw him on Bangor a month after the second time that you saw him?

(8) A. It might have been a month, but I don't know exactly how long it has been.

Q. And did you say anything to your mother about it then?

A. Yes, sir, I sure did, and she took the license plate number down, and she said she was going to call the Women's Division the next day.

Q. All right. And was he in an automobile at that ime?

A. Yes, sir, he was.

Q. And was he the only person in the car?

A. He was inside of the car, and two girls and another man was standing there around the car.

Q. All right. And after this day when did you next see him, if you did?

A. On 23rd and Michigan.

Q. And when was that, in relation to today?

A. That was on March 25.

Q. And what did you do at that time?

A. Well, I went back into Cheri's house and we told her mother, and she came out, and he got into a car and parked on the parking lot, and we went back and called the

police, and they took the report of it, and then we seen him going down Michigan with some more men, around Hygrade's and then we called the police and told them where they went, and then they went around there and arrested him.

Q. All right. And do you recall how much time has elapsed (9) between the time these events happened, until today?

A. Yes, sir.

Q. All right, how much time has passed, would you say?

A. Oh, about two months.

Q. All right. Now, Miss Reynolds, I am sure that you don't want to make any mistakes here, do you?

The Court: That is Miss Daniels, Counsel.

Mr. Jackson: Or, I am sorry.

Q. Miss Daniels, I am sure you don't want to make any mistakes, do you?

A. No.

Q. And you say that the man who assaulted you on this particular night, had a heavier mustache, perhaps, is that right?

A. Well, yes, it looks like it is heavier.

Q. And if I told you that this man has a brother who has a heavier mustache than he has, would you still say that this is the same man?

A. Yes, sir, because I know it is him.

Q. What makes you so sure that this is the man?

A. Because I know the way his face is made, you know.

Q. Well, if I told you that he has a brother who strongly resembles him, would you still say that this is the same man?

(10) A. Yes, sir, that is him all right.

Q. How do you know that that is him?

A. Because of the way his mouth is shaped, and his eyes.

Q. All right. Now, did you give a description of this man to the Police Department on the night this happened, or shortly after the night that these events occurred?

A. Yes, sir.

Q. All right, and what description did you give the police?

A. I said he was about 35 to 40.

Q. Yes.

A. And he had a black mustache, and he was kind of tall, and with a black coat, and he was just in his stocking feet.

Q. All right. Now, did you ever view this man in a showup?

A. Yes,—or, no.

Q. Did you ever go to the Police Headquarters, where they had a number of men in a lineup there?

A. Yes.

Q. And when was that?

A. It was the 19th, I think, of February, but I am not sure.

Q. And did you see anyone in that lineup that resembled the man?

A. He wasn't in it.

Q. Or did you see anyone in that lineup that did resemble him?

A. No.

Q. Did you pick anyone out of that lineup at that time?

(11) A. No.

Q. Did you see any other lineup?

A. No.

Q. Or did you look at any photographs?

A. Yes.

Q. And when did you look at the photographs?

A. On the 25th of March.

Q. And did you pick anyone out of the photographs?

A. Yes.

Q. And who did you pick out of the photographs, if you know?

A. Him.

Q. All right. And you hadn't seen any photographs prior to the 25th of March, is that right?

A. No, I hadn't.

Q. How many photographs did you look at on the 25th of March?

A. They just brought one out, and that was his picture.

Q. They just brought one out, and that was his picture, you say?

A. Yes, sir.

Q. All right. Now, are you saying that this is the man that you saw in the photograph, or that this is the man that was in your room that night?

A. This is the man that was in my room, and in the photographs, too.

Mr. Jackson: All right, no further (12) questions here.

The Court: Is that all?

Mr. Cain: Yes, sir, that is all, your Honor please.

At this time I will move to bind the defendant, Leonard Rainwater, over for trial on the charges contained in the Complaint and Warrant.

The Court: All right. Now, we have established and stipulated here the fact that the crime as charged in the Complaint and Warrant was committed in the City of Detroit, is that correct, Counsel?

Mr. Jackson: That is correct, your Honor.

The Court: All right, so we don't have to go into that part of it.

From listening to the testimony of the complaining witness, it appears that this crime as charged was committed

in the City of Detroit, and that there is probable cause to show that this defendant may have committed that offense, so I will bind the defendant over for trial on the charges contained in the Complaint and Warrant.

I am not inclined to reduce his bond at all, so I will continue the bond on the defendant.

* * * * *

ARRAIGNMENT ON INFORMATION

State of Michigan

In the Recorder's Court for the City of Detroit

The People of the State of Michigan, vs. Leonard Rainwater.	A 152337

Record of Arraignment on Information

Date 4-21-69

Defendant's Address WCJ

1. The undersigned defendant and attorney hereby waive the formal calling of this case and the reading of information at the arraignment on the information; certify that defendant is in court; that the purpose of the arraignment on information and this waiver have been explained to defendant; that the following is the signature of said defendant consenting to such waiver; and that the attorney of record or is appearing for the record attorney.

Indicate one:

2. Defendant: Stands mute (being advised a plea of Not Guilty will be entered for him).

4. If an Examination was held, will a transcript be required:

Yes

/s/ Leonard Rainwater
Defendant's signature
/s/ James Jackson, Jr.
Attorney
Acting for Defendant
Attorney of Record
600 Penobscot
Telephone number 965-4384

(Unless otherwise indicated, this will be considered a general appearance.)

NOTE: If defendant Stands Mute or Pleads Not Guilty, he need not answer call. If a further plea or Guilty plea is offered, discuss with Prosecutor. Please use legible writing, and see that waiver is complete and gets in file.

Received copy of information

James Jackson, Jr.
Attorney for Defendant

WAIVER OF TRIAL BY JURY

State of Michigan

In the Recorder's Court for the City of Detroit

The People v Leonard Rainwater	No. 152337 Offense: CKF

At a session of the Recorder's Court for the City of Detroit held in said city on the 17th day of July, A.D. 1969.

Present: Hon. Joseph Gillis, Judge of Recorder's Court.

I, Leonard Rainwater, being the defendant in the above entitled cause, having been arraigned therein on the charge of ..... and having had opportunity to consult with counsel, do hereby in open Court voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the above named Court, in which this cause is pending.

I fully understand that under the laws of this state I have a constitutional right to a trial by jury.

(Signed) Leonard Rainwater
Defendant

I have advised the above named defendant of his constitutional right to a trial by jury.

(Signed) James Jackson, Jr.
Attorney for Defendant

The above named defendant signed his name to the foregoing waiver of trial by jury in my presence on the above recited date.

/s/ R. D. Herbertson,
Deputy Clerk

PLEA OF GUILTY AND SENTENCE

State of Michigan

In the Recorder's Court of the City of Detroit

The People of the State of Michigan, v Leonard Rainwater	Case Number A 152 337

Proceedings had and testimony taken in the above-entitled cause, before the Hon. Joseph A. Gillis, a Judge of the Recorder's Court of the City of Detroit, on Thursday, July 17, 1969, and Tuesday, August 19, 1969.

Appearances: John McConnell, appearing on behalf of the People; James Jackson, July 17th and August 19th and Max Tauber, August 19th, appearing on behalf of the Defendant.

(2)

Detroit, Michigan
Thursday, July 17, 1969
11:55 A.M.

The Court: Case of the People versus Leonard Rainwater, File A 152 337.

Mr. Jackson: Mr. Rainwater has been advised by me that he has a constitutional right to a trial by jury or a trial by the Court without a jury. He has executed a waiver of trial by jury.

He desires also at this time to waive a trial by this Court.

I have talked with Mr. Rainwater on several occasions; the investigator from our office has talked to him. We have done a rather thorough investigation on this case.

After all these conversations with Mr. Rainwater, he tells me he desires to enter a plea of guilty to the first count of breaking and entering an occupied dwelling with intent to commit a felony rape.

(3) *Questions by the Court to Defendant*

Q. Mr. Rainwater, you have heard your attorney offer a plea of guilty to breaking and entering an occupied dwelling, at 2773—25th Street, on February 18, 1969, with intent to commit rape upon the person of Bernita Daniel.

Do you concur with your attorney's offer of a plea of guilty?

A. Yes.

Q. Has anyone forced you to plead guilty?

A. No, sir.

Q. Has anyone promised you leniency if you pled guilty?

A. No, sir.

Q. Why are you pleading guilty?

A. I broke into the house and got to the girl.

Q. Did you rape her?

A. Yes.

Q. How old are you?

A. Thirty-five.

Q. How far have you gone in school?

A. Never went to school.

Q. Have you ever held any employment?

A. Yes.

Q. What kind of jobs have you held in the past ten years?

(4) A. Ever since I've been in Michigan. I only had me three or four jobs. The ones I had was down south.

Q. How long have you held a job?

A. About eight years.

Q. What kind of job did you hold for eight years?

A. Lumberyard work.

Q. Can you read and write?

A. A little.

Q. You have had a chance to talk with your assigned counsel Mr. Jackson?

A. Yes.

Q. Are you satisfied with Mr. James Jackson's advice and counsel in this case?

A. Yes.

Q. Do you realize by pleading guilty you are waiving your right to a jury trial or a trial before the Court without a jury?

A. Yes.

Q. If you go to trial, you are not required to take the stand and testify; if you go to trial, the prosecutor must prove you guilty beyond a reasonable doubt.

Do you understand this?

A. Yes.

(5) Q. Do you realize by pleading guilty you subject yourself to a possible sentence of up to 15 years in the State Prison?

A. Yes.

Q. You are on parole at the present itme, are you not?

A. Yes.

Q. You are serving a sentence of 5 to 10 years for assault with intent to commit rape and breaking and entering; is that correct?

A. Yes.

Q. That sentence was in November 1964 in Recorder's Court, is that correct?

A. Yes.

Q. Do you realize by pleading guilty to this you are classifying yourself as a parole violator, and the Parole Board may require you to serve the full term until 1974?

A. Yes.

Q. Are you awaiting trial on any other charges?

A. (No response.)

Mr. Jackson: I don't believe so, your Honor.

Q. Now, the Information charges that:

> On February 18, 1969, you did feloniously (6) break and enter an occupied dwelling at 2773—25th Street with intent to commit the crime of rape.

Will you tell the Court what you did on February 18, 1969, involving this house on 25th Street?

A. I broke into the house and got to the girl and raped her.

Q. You what?

A. I broke into the house and raped the girl—broke the door.

Q. After you got in the house, what did you do?

A. I raped her.

Q. Raped who?

A. I don't know her name.

Q. This girl?

A. Yes.

Q. You had sexual relations with her—

A. Yes.

Q. —against her will?

A. Yes.

Q. Did you have any weapon?

A. No.

(7) The Court: Very well, I will accept your plea of guilty to breaking and entering an occupied dwelling with intent to commit rape.

Q. Now, you were released from prison last December; is that correct?

A. Yes.

Q. This offense occurred three months later, is that right? This occurred in March.

A. Yes.

Q. You had been on the street only January, February, and March.

A. Yes.

The Court: Do you want to waive the pre-sentence report?

Mr. Jackson: May I take one minute?

The Court: Yes.

(Conference between Mr. Jackson and the Defendant outside the hearing of the Reporter.)

(8) Mr. Jackson: Your Honor.

We have no objection to waiving the pre-sentence report.

However, the defendant would prefer to be sentenced one week from today.

There are some things he has to do.

The Court: Very well.

I will get the old pre-sentence report from back in 1964. There has been no material changes in his condition, other than he was in prison on exactly the same charge.

So sentencing will be a week from today on July 24th.

(Whereupon on Thursday, July 24, 1969, sentence was adjourned until Tuesday, August 19, 1969.)

(9)

Detroit, Michigan
Tuesdays, August 19, 1969

The Court: Case of the People versus Leonard Rainwater, File A 152 337.

Q. Mr. Rainwater, you pled guilty to breaking and entering an occupied dwelling with intent to commit the crime of rape?

As you are aware, the maximum penalty the Court can impose is 15 years in prison.

I note you are on parole for the same offense.

Are there any circumstances you wish to bring to the attention of the Court prior to the imposition of sentence?

A. Yes, sir.

I would like to get my money back from this fellow here —*this* attorney here (indicating attorney Max Tauber).

Q. This has nothing to do with your sentence.

A. He beat me out of my money. I would like to get my money back.

Mr. Tauber: We are here about the sentence.

(10) Mr. Jackson: I have just finished discussing this entire matter with Mr. Rainwater, as I have before the plea.

He is satisfied with his plea and is ready for the Court to sentence him at this time.

He only wants the Court to know that he was trying to make arrangements to get down to Atlanta, Georgia, where he has relatives that could care for him.

That didn't work out.

As a consequence, he is now in these difficulties.

He recognizes that the Court has a full and complete Probation Report.

He desires that the Court sentence him at this time.

The Court: He had a breaking and entering back in 1962.

He had an assault with intent to commit rape back in 1964.

He had a breaking and entering in 1964.

He is on parole right now; present sentence doesn't run out until 1974.

(11) This offense carries a maximum of 15 years; and this was a rape at knife point after breaking and entering.

The sentence of the Court is 14 to 15 years.

You will be given credit for 145 days spent in the Wayn County Jail.

Now, it is my duty to inform you that you have a constitutional right to appellate review of your conviction.

If you are financially unable to provide counsel to perfect such appeal, the Court will appoint counsel for you and will furnish counsel with such portions of the trial transcript as counsel requires to prepare post-conviction motions and to perfect an appeal.

I further advise you that if you claim financial inability and request the Court to appoint counsel, such request must be made within 60 days from this date.

For that purpose use the form which is now handed to you, which form you must execute under oath. That request must be accompanied by detailed answer to the questionnaire form which is also now handed to you. This too must be sworn to.

(12) It is for the purpose of assisting the Court to determine whether or not you are indigent.

At this point sign the receipt for the questionnaire form and also for the form requesting appointment of counsel.

• • • • •

State of Michigan,
County of Wayne—ss.

I, Glenn W. Rose, Official Court Reporter, do hereby certify that I have recorded stenographically the proceedings had in the above-entitled cause, before the Hon. Joseph A. Gillis, one of the Judges of the Recorder's Court of the City of Detroit, on date and at the time and place hereinbefore set forth, and that the forgoing transcript is a full, true, and correct transcript of my said Stenotype notes.

/s/ Glenn W. Rose
Official Court Reporter

Dated: October 20, 1969

OPINION OF THE COURT OF APPEALS

(State of Michigan—Court of Appeals—Division 1)

People of the State of Michigan, Plaintiff-Appellee, v Leonard Rainwater, Defendant-Appellant.	No. 8465

Before: Fitzgerald, P.J., Holbrook and T. M. Burns, JJ.

Per Curiam.

The people move to affirm (GCR 1963, 817.5[3]) defendant's conviction, on plea of guilty, of breaking and entering an occupied dwelling house with intent to commit the felony of rape, contrary to MCLA § 750.110 (Stat Ann 1970 Cum Supp § 28.305).

On appeal, defendant contends that the trial court erred in accepting the plea without determining that defendant knew what rape entailed and what sexual relations meant. He also contends there was error because the court failed to determine whether or not defendant had a felonious intent at the time of the breaking. Finally, defendant contends that his 14-15 year prison sentence violates the indeterminate sentence statute because it removes all discretion from the Department of Corrections.

It is manifest that the questions sought to be reviewed, on which the decision of the cause depends, are so unsubstantial as to need no argument or formal submission.

Defendant does not contend that he did not understand the nature of the accusation or that he was unware of the meaning of the phrase "sexual relations." Nor is there anything in the record to indicate to the trial court that the defendant was unaware of the meaning of the words and phrases which he used to describe his conduct.

Before accepting a plea of guilty, it is not necessary that the trial court explain each element of the crime to the defendant, *People* v *Melvin* (1969), 18 Mich App 652, or that defendant acknowledge in his own words each and every element of the offense, *People* v *Donald T. Moore* (1970), 21 Mich App 150. It is necessary only that the trial court reasonably ascertain the truth of the plea. *People* v *Bartlett* (1969), 17 Mich App 205. We are satisfied from the record in this case that there is a substantial factual basis for the plea.

Finally, the sentence in this case was imposed within the trial court's sound discretion in accord with his evaluation of the defendant as an individual. See *People* v *Lessard* (1970), 22 Mich App 342. The sentence does not prohibit an exercise of discretion by the Department of Corrections.

Motion to affirm is granted.

ORDER DENYING MOTION TO VACATE SENTENCE AND JUDGMENT, WITHDRAWAL OF GUILTY PLEA, MOTION FOR NEW TRIAL, AND NOTICE OF HEARING

(State of Michigan—Recorder's Court—City of Detroit)

The People of the State of Michigan, v Leonard Rainwater	Case Number A 152 337

At a session of said court held in the Frank Murphy Hall of Justice, Detroit, Michigan, on August 23, 1972.

Present: Hon. Joseph A. Gillis.

This matter having come on to be heard, and the Court being fully advised in the premises,

It Is Hereby Ordered that the motion to vacate sentence and judgment, withdrawal of guilty plea, motion for new trial, and notice of hearing, filed by the defendant, is hereby denied.

/s/ Joseph A. Gillis
Presiding Judge

JAG:gr
cc: Prosecuting Attorney
Defendant

ORDER OF COURT OF APPEALS REMANDING FOR APPOINTMENT OF COUNSEL

(State of Michigan—Court of Appeals)

People of the State of Michigan,
Plaintiff-Appellee,
v
Leonard Rainwater,
Defendant-Appellant.
L. Ct. No. A 152 337

No. 15132

At a Session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Lansing, on the 15th day of January in the year of our Lord one thousand nine hundred and seventy-three.

Present the Honorable Robert J. Danhof, Presiding Judge, Timothy Quinn, Louis McGregor, Judges.

In this cause an application for delayed appeal is filed by defendant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It Is Ordered that the application be, and the same is hereby Granted.

It Is Further Ordered that the cause be, and the same is hereby Remanded to the Recorder's Court which shall forthwith determine whether defendant is indigent and whether he wishes to have appellate counsel appointed to represent him in this appeal. If both questions are determined in the affirmative, the Recorder's Court shall forthwith appoint appellate counsel for the defendant. Within 10 days after the entry of the order of appointment, counsel shall file in this numbered cause a claim of appeal as re-

quired by GCR 1963, 803.2 and a copy of the order of appointment.

It Is Further Ordered that this cause be, and the same is hereby Consolidated with *People* v *Ponder*, Docket No. 14970, leave to appeal granted November 28, 1972, for purposes of argument and decision only. The two cases shall be separately briefed by respective counsel.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 17th day of January in the year of our Lord one thousand nine hundred and seventy-three.

/s/ Ronald L. Dzierbicki,
Clerk

ORDER FOR APPOINTMENT OF COUNSEL AND TRANSCRIPT OF TRIAL AT PUBLIC EXPENSE

(State of Michigan—Recorder's Court—City of Detroit)

The People of the State of Michigan,
Plaintiff,
v
Leonard Rainwater,
Defendant.

File No. A 152 337

Transcript of Plea and Sentence Filed October 21, 1969.

At a session of said court held in the Recorder's Court Building, City of Detroit, Wayne County, Michigan, this 27th day of January, A.D. 1973.

Present: Honorable Joseph A. Gillis, Recorder's Court Judge.

A Petition for Appointment of Counsel and Affidavit in support of claim of indigency having been filed by the defendant Leonard Rainwater, and said Petition and Affidavit having been considered by the Court, the Court finds that the defendant is without means to secure counsel for Appellate review in the said cause.

It Is Hereby Ordered, that William R. Stackpoole, Attorney-at-Law, address 1916 Penobscot Bldg., Detroit, MI 48226 (Phone: 965-8650) be assigned as counsel for the defendant in post-conviction proceedings, and

It Is Further Ordered, that Glenn W. Rose, Court Stenographer, furnish such portions of the trial transcript as are necessary in the said cause which is to be filed with the Clerk of the Trial Court, and

It Is Further Ordered, that said stenographer shall be compensated for such transcript as provided by law.

[X] Plea

/s/ Joseph A. Gillis
Judge of Recorder's Court

Proof of Service

Copies of this Order were mailed to Prosecutor,

Counsel, Stenographer and Defendant.

Appellate Division—Recorder's Court

Court of Appeals—Court Administrator

/s/ Robert D. Herbertson
Deputy Clerk.

ORDER DENYING MOTION TO AFFIRM

(State of Michigan—Court of Appeals)

The People of the State of Michigan, Plaintiff-Appellee, v Leonard Rainwater, Defendant-Appellant.	Docket #15132 L.C. #A152337

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Grand Rapids, on the twenty-first day of December in the year of our Lord one thousand nine hundred and seventy-three.

Present the Honorable Thomas M. Burns Presiding Judge, John W. Fitzgerald, Wade Van Valkenburg, Judges.

In this cause defendant-appellant has filed a brief on the merits in support of his appeal, and the plaintiff-appellee

having filed a motion to affirm pursuant to GCR 1963, 817.5(3), and due consideration thereof having been had by the Court,

It Is Ordered that the motion to affirm be, and the same is hereby Denied for failure to persuade the Court that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 26th day of December in the year of our Lord one thousand nine hundred and seventy-three.

/s/ Donald L. Dzierbicki,
Clerk

OPINION OF THE COURT OF APPEALS

(State of Michigan—Court of Appeals—Division I)

People of the State of Michigan,
Plaintiff-Appellee,
v
Leonard Rainwater,
Defendant-Appellant.

No. 15132

Before: Brennan, P.J.; McGregor and T. M. Burns, JJ.

Per Curiam.

On July 17, 1969, the defendant pled guilty in Recorder's Court to a charge of breaking and entering an occupied dwelling with intent to rape, MCLA 750.110; MSA 28.305, and was sentenced to a term of 14 to 15 years in prison.

At the plea taking, the defendant was advised of his right to trial by jury, and of his right not to take the stand; however, nothing was said about defendant's right to confront and cross-examine his accusers.

Defendant filed a claim of appeal and this Court granted the people's motion to affirm on December 7, 1970. In his appeal, the defendant did not argue that he had not been advised of his right against self-incrimination and his right to confront his accusers. Among other things, he did argue that his 14 to 15 year prison sentence violated the Indeterminate Sentence Act. See *People* v *Rainwater*, 28 Mich App 519, 184 NW2d 516 (1970).

Subsequent to this Court's decision, cited above, our Supreme Court released its opinions in *People* v *Jaworski*, 387 Mich 21, 194 NW2d 868 (1972) and *People* v *Tanner*, 387 Mich 683, 199 NW2d 202 (1972).

In *Jaworski, supra,* the Supreme Court interpreted *Boykin* v *Alabama,* 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969) as requiring that the trial court, prior to accepting a plea of guilty, advise a defendant, on the record, of three constitutional rights he is waiving in entering a plea, specifically, his right to trial by jury, his privilege against self-incrimination, and his right to confront and cross-examine his accusers.

In *Tanner, supra,* the Court held that "any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the Indeterminate Sentence Act." 387 Mich 683, 690, 199 NW2d 202, (1972).

Relying on these two decisions, the defendant made a motion in the recorder's court on August 7, 1972, to have his sentence and plea vacated. That motion was denied by the trial court and the defendant, in *pro per,* sought leave to appeal in this Court.

In his motion for leave to appeal, the defendant contended that the trial court had failed to advise him of his constitutional right to confrontation and of his constitutional privilege against self-incrimination. He also contended that his sentence violated the Indeterminate Sentence Act. Leave to appeal was granted by this Court and the case was consolidated with *People* v *Ponder* (No. 14979), since both appeals raised the issue of the trial court's failure to advise the defendant of his right to confront his accusers. [Notwithstanding such consolidation, we deem it advisable to issue separate opinions because *Ponder* involves significant issue not present here.] Thereafter, the case was remanded to the recorder's court for appointment of appellate counsel. However, on appeal, counsel briefed only the *Tanner* question; the *Jaworski* issue was not briefed.

The dispositive issue before this Court is whether the trial court at the plea taking failed to advise the defendant of the constitutional rights he was waiving in pleading guilty, in accordance with *Boykin* and *Jaworski*.

Initially, we note that the *Jaworski* issue has been briefed by defendant's counsel in neither of his two appeals. With respect to the first appeal, it is likely that the failure to raise the issue is attributable to the fact that, although *Boykin* had been decided, our Supreme Court's interpretation of it, in *Jaworski*, had not been released. With respect to the second appeal, defendant did raise the issue in his *pro per* application for leave to appeal, although his counsel did not pursue it in his brief on appeal. In these circumstances and in light of the fact that this Court may consider reversible error even if not raised on appeal, the issue is properly before us. See *People* v *Sanders*, 43 Mich App 698, 701; 204 NW2d 607 (1972).

The Michigan Supreme Court has held that its decision in *Jaworski* is applicable to guilty pleas accepted after June 2, 1969. Because defendant's plea was accepted on July 17, 1969, *Jaworski* requires that the record affirmatively show that the defendant was advised of his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers.

The record reveals that at no point was the defendant advised of his right to confront his accusers. This was error and mandates reversal.

In keeping with our holding in *People* v *Charles Ponder* (No. 14970), decided this day, we reverse the defendant's conviction and remand for a new trial.

The *Tanner* issue is moot, in light of this disposition.

Reversed and remanded.

ORDER DENYING APPLICATION FOR REHEARING

(State of Michigan—Court of Appeals)

People of the State of Michigan, Plaintiff-Appellee, v Leonard Rainwater, Defendant-Appellant.	Docket #15132 L.C. No. A-152337

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Detroit, on the 19th day of July in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable Vincent J. Brennan Presiding Judge, Louis D. McGregor, Thomas M. Burns Judges.

In this cause an application for rehearing having been filed by plaintiff-appellee, and an answer in opposition thereto having been filed by defendant-appellant, and due consideration thereof having been had by the court;

It Is Ordered that the application for rehearing be, and the same is hereby, Denied.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 23rd day of July in the year of our Lord one thousand nine hundred and seventy-four.

/s/ Ronald L. Dzierbicki
Clerk

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan—Supreme Court)

CR 13-276

People of the State of Michigan, Plaintiff-Appellant, v Leonard Rainwater, Defendant-Appellee.	56189 A-152337

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the City of Lansing, on the 18th day of October in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable Thomas M. Kavanagh, Chief Justice, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby Denied, because the appellant has failed to persuade the Court that the question presented should be reviewed by this Court.

J. W. Fitzgerald, J., not participating.

Received October 22, 1974 the Recorder's Court Appellate Division.

State of Michigan—ss.

I, Donald F. Winter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of October in the year of our Lord one thousand nine hundred and seventy-four.

/s/ Corbin R. Davis,
Deputy Clerk

CERTIFICATE OF CLERK OF RECORDER'S COURT

(State of Michigan—Supreme Court)
(The Recorder's Court—City of Detroit)

State of Michigan,
County of Wayne,
City of Detroit—ss.

I, Alex E. Renaud, Clerk of the Recorder's Court of the City of Detrit, do hereby certify that the foregoing is correctly taken and copied from the original record in the case of People vs. Leonard Rainwater Case No. A 152337 now remaining in my office, and of record in said Court, and that the same has been examined and compared by me with the original of said record in said case, and that it is a correct transcript therefrom, and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Detroit, this 8th day of January in the year one thousand nine hundred and Senevty-five.

By: /s/ Pat Lathon,
Deputy Clerk